

1 **WO**

2  
3  
4  
5 **NOT FOR PUBLICATION**

6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Fitness Together Franchise Corporation, ) No. CV-09-0890-PHX-FJM

10 Plaintiff, )

**ORDER**

11 vs. )

12 Higher Level Health and Fitness, Inc.; )  
13 Joseph Riccardi, )

14 Defendants. )  
15 \_\_\_\_\_ )

16  
17 The court has before it “Plaintiff’s Application for Entry of Default Judgment and  
18 Permanent Injunction Against Defendants” (doc. 18), defendants’ letter in response to the  
19 motion (doc. 20), and plaintiff’s reply (doc. 22).

20 Plaintiff Fitness Together Franchise Corporation (“Fitness Together”) alleges that it  
21 “has developed a unique and proprietary business method for the operation of businesses that  
22 offer one-on-one personal fitness training,” known as the “Fitness Together Franchise  
23 System.” Complaint ¶ 8. Defendants entered into a franchise agreement with Fitness  
24 Together on January 9, 2006 (“Franchise Agreement”), which contained a covenant not to  
25 compete within an eight-mile radius for a period of one year following the termination of the  
26 franchise agreement. The Agreement was terminated on January 9, 2009. Complaint ¶ 22.  
27  
28

1 Fitness Together filed its complaint on April 28, 2009, alleging that defendants have  
2 breached the Franchise Agreement by continuing to offer competitive personal fitness  
3 services, and by utilizing the Fitness Together Franchise System and proprietary assets.  
4 Defendants failed to answer or otherwise respond to the complaint and default was entered  
5 by the clerk of the court on June 16, 2009. Fitness Together then filed its application for  
6 entry of default judgment and permanent injunction. Defendant Joseph Riccardi filed a letter  
7 in response to the application for default judgment, stating that he currently offers “class and  
8 group training” at his new location, as well as “a few individual one on one session[s]” (doc.  
9 20 at 2).

10 After an entry of default, we may grant default judgment pursuant to Rule 55(b)(2),  
11 Fed. R. Civ. P. In exercising our discretion under Rule 55(b)(2), we may consider the  
12 possibility of prejudice to the plaintiff, the merits of the claims, the sufficiency of the  
13 complaint, the amount of money at stake, if any, the possibility of a dispute of material facts,  
14 whether default was due to excusable neglect, and the policy favoring a decision on the  
15 merits. Eitel v. McCool, 782 F.2d 1470, 1471 (9th Cir. 1986).

16 The Eitel factors weigh in favor of a default judgment in this case. Plaintiff will likely  
17 be without other recourse in the absence of a default judgment. The complaint states a claim  
18 for relief under the notice pleading standards, and the factual allegations of the complaint are  
19 taken as true once default is entered. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-  
20 18 (9th Cir. 1987). Given the sufficiency of the complaint and defendants’ default, no  
21 genuine dispute of material facts would preclude granting the present motion. Plaintiff does  
22 not seek monetary damages, but injunctive relief only. Defendants were properly served and  
23 offer no explanation for their failure to respond. The failure to respond makes a decision on  
24 the merits impracticable. Because these factors weigh in favor of default judgment, it is  
25 ordered granting Fitness Together’s application for entry of default judgment (doc.18).

26 Plaintiff’s application for entry of permanent injunction is also granted, but only to  
27 the extent that it enjoins defendants’ activities involving one-on-one personal fitness training.  
28 A non-compete clause is unreasonable and unenforceable if it is broader than necessary to

1 protect the legitimate interests of the covenantee. Gann v. Morris, 122 Ariz. 517, 519, 596  
2 P.2d 43, 45 (Ct. App. 1979). A restriction is reasonable where it is limited “to the kind and  
3 character of the business sold.” Id. at 518, 596 P.2d at 44. Because Fitness Together  
4 describes its unique and proprietary business method as “one-on-one personal fitness  
5 training,” the injunction is reasonable only to the extent that it restricts activities involving  
6 one-on-one personal fitness training. Therefore, a permanent injunction is granted as  
7 follows:

8       a. For a period of one year from the date of the termination of the Franchise  
9 Agreement, defendants may not establish, assist, consult with, participate in, or be employed  
10 by any enterprise that is or plans to be engaged in the Territory (as defined in the Franchise  
11 Agreement and the Riccardi Addendum) or within an eight mile radius of the boundaries of  
12 the Territory, in offering personal fitness training sessions, meetings, workshops, or other  
13 programs, or selling educational materials, involving marketing and selling fitness training,  
14 that is the same as, similar to, or competitive with the subject matter of Fitness Together  
15 programs or materials which defendants were entitled to sell pursuant to the Franchise  
16 Agreement. This injunction is limited to activities involving one-on-one personal fitness  
17 training.

18       b. Defendants are prohibited from any unauthorized use of the Fitness Together  
19 Franchise System or the Proprietary Assets.

20       c. Defendants, their agents, servants, and employees, and those persons in active  
21 concert or participation with them who received actual notice of this permanent injunction,  
22 by personal service or otherwise, are ordered to return all confidential and proprietary  
23 information belonging to Fitness Together within twenty days of this order.

24       d. Defendants shall file with the court and serve upon plaintiff’s counsel within thirty  
25 days of this order a written report, under oath, setting forth in detail the manner in which they  
26 have complied with this injunction and order.

**IT IS ORDERED GRANTING** plaintiff's motion for default judgment and permanent injunction as set forth above (doc. 18), and **DENYING** plaintiff's motion for preliminary injunction as moot (doc. 3).

DATED this 27<sup>th</sup> day of August, 2009.

*Frederick J. Martone*  
Frederick J. Martone  
United States District Judge